

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 78

THE UNITED STATES, PETITIONER,

vs.

THE ALLEN-BRADLEY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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In the United States Court of Claims

No. 290-55

ALLEN-BRADLEY COMPANY, PLAINTIFF,*v.***THE UNITED STATES OF AMERICA, DEFENDANT****PETITION—Filed July 22, 1955**

*To the Honorable Judges of the Court
of Claims of the United States:*

The plaintiff, Allen-Bradley Company, brings this action to recover from the United States of America the sum of \$178,327.75 representing excess profits taxes for the year ended November 30, 1944 and excess profits taxes and declared value excess-profits taxes for the year ended November 30, 1945. As grounds for its claim, the plaintiff respectfully represents to the Court as follows:

2 1. Plaintiff is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office and place of business at 136 West Greenfield Avenue, Milwaukee 4, Wisconsin.

2. Within the time prescribed by law, the plaintiff filed with the Collector of Internal Revenue at Milwaukee, Wisconsin, Federal tax returns showing liability for corporate income taxes, excess profits taxes, and declared value excess-profits taxes for the taxable and fiscal years ended November 30, 1944 and November 30, 1945 in the following amounts:

	Fiscal Year Ended 11/30/44	Fiscal Year Ended 11/30/45
Declared value excess-profits tax.....	\$ 13,730.63	\$ 44,059.45
Income tax.....	126,663.46	126,795.81
Excess profits tax.....	2,589,016.44	1,918,809.50

After allowances were made for credits under Section 3806(b) of the Internal Revenue Code of 1939 and after

allowances were made for ten per cent post-war refund credits under Sections 780 and 781 of the Internal Revenue Code of 1939, the plaintiff paid the following taxes for the years ended November 30, 1944 and November 30, 1945:

	Fiscal Year Ended 11/30/44	Fiscal Year Ended 11/30/45
Declared value excess-profits tax.....	\$ 18,999.12	
Income tax.....	126,663.46	126,795.81
Excess profits tax.....	1,423,521.50	1,663,467.50
Total.....	<u>\$1,550,184.96</u>	<u>\$1,809,262.43</u>

3. The plaintiff voluntarily paid additional declared value excess-profits taxes and excess profits taxes for the year ended November 30, 1945 as a result of an additional Federal income tax due upon a refund of Wisconsin income taxes arising out of renegotiation of war contracts as follows:

	Fiscal Year Ended 11/30/45
Declared value excess-profits tax.....	\$ 1,103.48
Excess profits tax.....	11,243.46

3. Following Revenue Agents' examinations for the years ended November 30, 1944 and November 30, 1945, the plaintiff received an over-assessment refund of income taxes and excess profits taxes for the year ended November 30, 1944 and paid deficiencies of declared value excess-profits taxes and excess profits taxes for the year ended November 30, 1945, as follows:

	Fiscal Year Ended 11/30/44	Fiscal Year Ended 11/30/45
Declared value excess-profits tax.....	\$.....	\$ 11,168.96
Income tax.....	(29.73)*	
Excess profits tax.....	(202,439.51)*	113,801.53

* Brackets connote an overassessment.

4. The net amount of income and excess profits taxes actually paid by the plaintiff for the years ended November 30, 1944 and November 30, 1945, after taking into account

4 the adjustments reflected in the facts set forth in
paragraphs 2 and 3, are as follows:

	Fiscal Year Ended 11/30/44	Fiscal Year Ended 11/30/45
Declared value excess-profits tax.....	\$ 31,271.56	
Income tax.....	126,633.73	126,795.81
Excess profits tax.....	1,221,081.99	1,788,512.49
Total.....	<u>\$1,347,715.72</u>	<u>\$1,946,579.86</u>

5. In determining plaintiff's Federal tax liability for the years ended November 30, 1944 and November 30, 1945, the Commissioner erroneously and illegally failed to allow as additional deductions the amounts of \$61,234.49 and \$175,143.74. Those amounts represent the difference between additional deductions which were allowable under Section 124 of the Internal Revenue Code of 1939, as amended, and depreciation deductions actually allowed the plaintiff by the Commissioner under Section 23 of the Internal Revenue Code of 1939.

6. The facts in respect to the errors alleged in Paragraph 5 are as follows:

(a) During the Second World War the plaintiff was engaged in the manufacture of motor controls, radio resistors, and radio parts, which were in short supply at the time. Directly and indirectly substantial quantities of the plaintiff's products were used by the Navy Department, the War Department, and the Maritime Commission in various types of equipment, which were used in the prosecution of the war.

5 (b) Because of the critical supply of motor controls, radio resistors, and radio parts and the immediate need therefor in the prosecution of the war, the plaintiff was requested by procurement officers of the Government to increase its production of the aforementioned products. Accordingly, the plaintiff did improve and increase its plant facilities and did obtain the necessary machinery and equipment to substantially increase its production.

(c) In connection with such expansion and pursuant to the provisions of Section 124 of the Internal Revenue Code of 1939, the plaintiff filed for and was issued nine Necessity Certificates. In each and every instance the duly designated certifying authority determined that the facilities described in the plaintiff's application for a Necessity Certificate were necessary in the interest of National defense. However, in three instances the duly designated certifying authority certified less than one hundred per cent (100%) of the cost of the facilities described in and covered by the Necessity Certificate as amortizable under Section 124 of the Internal Revenue Code of 1939. The refusal to certify the entire cost of the facilities as amortizable under Section 124 of the Internal Revenue Code of 1939 was in accordance with a policy which had been established of not permitting full amortization where the facilities were

presumed adaptable to post-war operations. In
6 this connection, Mr. John L. Lincoln, Chief of
Section Two of the Amortization Branch of the
Procurement Policy Division of the War Production
Board, in a letter to the plaintiff dated March 20, 1945,
concerning Necessity Certificate NC-8542, stated:

"The above application is in course of approval for 35% certification, rather than full certification as requested in your transmittal letter of February tenth, inasmuch as all of the facilities appear to be standard machine tools usable for production of a variety of peace-time articles, not special tools usable only for specific war production for which you propose to use them."

As a result of the refusal of the duly designated certifying authority to certify the entire cost of facilities described in and covered by Necessity Certificate WD-N-27705, as amended by Amendatory Necessity Certificate WD-N-27705-A; Necessity Certificate NC-2631; and Necessity Certificate NC-8542, the Commissioner of Internal Revenue refused to allow the plaintiff to

amortize the entire cost of the facilities described in and covered by such Certificates. The pertinent facts with respect to Necessity Certificate WD-N-27705 and its amendment, Amendatory Necessity Certificate WD-N-27705-A; Necessity Certificate NC-2631; and Necessity Certificate NC-8542 insofar as this Petition is concerned are set forth below.

7 (d) On October 12, 1943, the plaintiff filed with the Secretary of War, at that time a duly designated certifying authority, an application for a Certificate of Necessity in accordance with the provisions of Section 124 of the Internal Revenue Code of 1939 with respect to facilities having a total cost of \$927,270.00. Thereafter, on November 30, 1943, the Secretary of War issued Necessity Certificate WD-N-27705 certifying that the facilities described in Appendix A thereto were "necessary in the interest of National Defense during the emergency period, up to 25% of the cost attributable to the construction, erection, installation or acquisition thereof * * * ". By letter dated December 7, 1943, the plaintiff returned its certified copy of Necessity Certificate WD-N-27705 to the Secretary of War and informed him that the terms of the Certificate certifying only 25 per cent of the cost of the facilities as amortizable under Section 124 of the Internal Revenue Code of 1939 were unacceptable to it and, therefore that it was unwilling to proceed with the project for which it intended to use the facilities. By letter dated December 29, 1943, the plaintiff was notified that a certified copy of Necessity Certificate WD-N-27705 was being returned to it, and, in addition, that there was enclosed a certified copy of Amendatory Necessity Certificate WD-N-27705-A issued by direction of the Under Secretary of War, pursuant to Section 124 of the Internal Revenue Code of 1939, for the pur-

8 pose of amending Necessity Certificate WD-N-27705. Amendatory Necessity Certificate WD-N-27705-A, issued on December 23, 1943, amended Necessity Certificate WD-N-27705 by striking out "25%" of

the cost and in lieu thereof substituting "80%" of the cost. The facilities described in and covered by Necessity Certificate WD-N-27705 as amended by Amendatory Necessity Certificate WD-N-27705-A were constructed, purchased and installed at a cost of \$1,014,90.34.

(e) By Executive Order No. 9406, dated December 17, 1943, and Executive Order No. 9429, dated March 2, 1944, amending Executive Order No. 9406, issued by the President of the United States of America, pursuant to Title I of the First War Powers Act, 1941, the functions and duties of the Secretary of War and the Secretary of Navy with respect to the issuance of Necessity Certificates under Section 124 of the Internal Revenue Code of 1939 were transferred to the Chairman of the War Production Board, and, thereafter, all applications for Necessity Certificates filed on or after December 17, 1943, with certain immaterial exceptions, were required by such Executive Order, as amended, to be filed with and acted upon by the Chairman of the War Production Board.

(f) On February 25, 1944, the plaintiff filed with the Chairman of the War Production Board, at that time the duly designated certifying authority an application for a Certificate of Necessity in accordance with the provisions of Section 124 of the Internal Revenue Code of 1939 with respect to machinery and equipment having a total estimated cost of \$274,600.00. Thereafter, on March 30, 1944, the Secretary of the War Production Board issued to the plaintiff Necessity Certificate NC-2631 certifying that the machinery and equipment described in Appendix A * thereto was "necessary in the interest of National

* The Tax Amortization Branch of the War Production Board deleted certain machinery and equipment listed by the plaintiff in Appendix A to its application for a Necessity Certificate. The machinery and equipment described in Appendix A to Necessity Certificate NC-2631 had an estimated cost of \$271,310.00.

Defense during the emergency period up to 85% of the cost attributable to the construction, reconstruction, erection and installation or acquisition thereof, * * *". The facilities described in and covered by Necessity Certificate NC-261 were purchased and installed at a cost of \$125,990.28.

(g) On February 13, 1945, the plaintiff filed with the Chairman of the War Production Board, at that time the duly designated certifying authority, an application for a Certificate of Necessity in accordance with the provisions of Section 124 of the Internal Revenue Code of 1939 with respect to machinery and equipment having a total estimated cost of \$38,950.00. On March 30, 1945, the plaintiff mailed to the Chairman of the War Production Board a revised Appendix A to 10 the application for Necessity Certificate it filed on February 13, 1945. The machinery and equipment covered by the revised Appendix A had a total estimated cost of \$38,835.00. Thereafter, on April 4, 1945, the Secretary of the War Production Board issued to the plaintiff Necessity Certificate NC-8542 which stated as follows:

"It is hereby certified that the facilities described in the attached Appendix A * * * are necessary in the interest of National Defense during the emergency period up to 35% of the cost attributable to the acquisition thereof provided such facilities are received prior to July 15, 1945."

Pursuant to a request made in a letter dated July 13, 1945, the plaintiff was notified by letter dated July 21, 1945, that Necessity Certificate NC-8542 was amended by deleting the phrase "prior to July 15, 1945" and substituting therefor the phrase "prior to August 31, 1945". The facilities described in and covered by Necessity Certificate NC-8542 were purchased and installed at a cost of \$38,913.75.

7. The plaintiff alleges that the duly designated certifying authority acted arbitrarily, illegally, and without au-

thority with respect to Necessity Certificate WD-N-27705, as amended by Amendatory Necessity Certificate WD-N-27705-A; Necessity Certificate NC-2631; and Necessity Certificate NC-8542, described in subparagraphs (d), (f), and

11 (g) of paragraph 6 above, in certifying only a portion
of the cost of the facilities he determined to be

necessary in the interest of national defense as amortizable under Section 124 of the Internal Revenue Code of 1939. Under Section 124 of the Internal Revenue Code of 1939, the duly designated certifying authority, the Secretary of War and later the Chairman of the War Production Board, was authorized only to determine whether a facility qualified as a defense facility, and, when the authority determined it was a defense facility, the amortization of the entire cost thereof was allowable for tax purposes. That has been definitely established by this Court in *The Wickes Corporation v. United States*, 108 F. Supp. 616, and *The Ohio Power Company v. United States*, decided March 1, 1955 (1955 P-H Tax Service para. 72,469) and The Tax Court in *National Lead Co. v. Commissioner*, 23 T. C. No. 123. The language contained in the Necessity Certificates issued to the plaintiff is in all material respects identical to the language contained in the Necessity Certificates issued to the taxpayers in the *Wickes* and *Ohio Power* cases.

8. The plaintiff further alleges that the duly designated certifying authority, within the meaning of Section 124 of the Code, having certified that all the facilities described in and covered by Necessity Certificate WD-N-27705, as

amended by Amendatory Necessity Certificate WD-N-27705-A; Necessity Certificate NC-2631; and Necessity Certificate NC-8542, referred to in paragraph 6 above, were nec-

12 essary in the interest of national defense, and that its applications for such Necessity Certificates, having been timely filed, it is entitled to amortize the entire cost of all facilities described in and covered by such Certificates.

9. The plaintiff, in accordance with the provisions of Section 124 of the Internal Revenue Code of 1939, duly elected to amortize the total cost of the facilities described

in and covered by Necessity Certificate WD-N-27705, as amended by Amendatory Necessity Certificate WD-N-27705-A; Necessity Certificate NC-2631; and Necessity Certificate NC-8542 beginning with the month following the month construction was begun and/or acquisition was made, and subsequently it made a due election to terminate the period for amortization as of September 30, 1945, pursuant to the Presidential Proclamation declaring that the emergency had terminated. As a result of such elections the plaintiff is entitled under Section 124 of the Internal Revenue Code of 1939 to additional deduction for amortization of emergency facilities of \$61,234.49 for the year ended November 30, 1944, and of \$175,143.74 for the year ended November 30, 1945.

10. The Commissioner of Internal Revenue has allowed deductions for amortization of the facilities described in and covered by Necessity Certificate WD-N-27705, as amended by Amendatory Necessity Certificate WD-N-27705-A; Necessity Certificate NC-2631; and Necessity Certificate NC-8542, referred to in paragraph 6, only 13 \$255,602.82 for the year ended November 30, 1944, and of only \$677,053.05 for the year ended November 30, 1945, or a total of \$932,655.87. These deductions were erroneous because of the Commissioner's refusal to allow additional deductions for amortization under Section 124 of the Internal Revenue Code of 1939 for the years involved in the aggregate sum of \$247,178.50. The Commissioner did, however, allow \$2,352.31 and \$8,447.96 as deductions for depreciation under Section 23 of the Internal Revenue Code of 1939 for the respective years ended November 30, 1944 and November 30, 1945 with respect to the uncertified portion of the facilities. The amounts allowed as amortization deductions, totaling \$932,655.87 were comprised of 80 per cent of the total costs of the facilities described in and covered by Necessity Certificate WD-N-27705, as amended by Amendatory Necessity Certificate WD-N-27705-A; 85 per cent of the facilities described in and covered by Necessity Certificate NC-2631; and 35 per

cent of the facilities described in and covered by Necessity Certificate NC-8542.

11. As a result of the determination of the Commissioner of Internal Revenue, the plaintiff has been erroneously denied additional deductions for amortization of emergency facilities of \$61,234.49 for the year ended November 30, 1944, and of \$175,143.74 for the year ended November 30, 1945. Therefore, the plaintiff has overpaid its taxes for the year ended November 30, 1944 and the year ended November 30, 1945 as follows:

	Fiscal Year Ended 11/30/44	Fiscal Year Ended 11/30/45
Excess profits tax.....	\$48,987.60	\$117,780.66
Declared value excess-profits tax.....	11,559.49
Total.....	<u><u>\$48,987.60</u></u>	<u><u>\$129,340.15</u></u>

12. Within the time required by law and on March 30, 1953, the plaintiff duly filed Claims for Refund of excess profits tax and declared value excess-profits tax for the years ended November 30, 1944 and November 30, 1945 with the Collector of Internal Revenue for the Milwaukee, Wisconsin district. The grounds asserted in support of such Claims were substantially in accord with the facts and issues herein presented.

13. The Claims for Refund referred to in paragraph 12 were rejected by the Commissioner of Internal Revenue on November 12, 1954.

14. The plaintiff is the sole owner of the claims here asserted, and has not assigned or transferred such claims or any part thereof or interest thereon.

15. No action on the claims herein asserted has been had before either House of Congress or in any of the Executive Departments, except as heretofore alleged.

Wherefore, plaintiff prays judgment against the United States of America for the net sum of \$178,327.75, or 15-16 such greater amount as is legally refundable, together with interest thereon according to law, and

for such other and further relief as the merits of the case may require.

Respectfully submitted,

(S.) HARVEY W. PETERS,
Attorney for Plaintiff,
1308 North Prospect Avenue,
Milwaukee 2, Wisconsin.

17 In the United States Court of Claims

ANSWER—Filed November 15, 1955

The United States of America, defendant herein, by H. Brian Holland, its Assistant Attorney General, answers plaintiff's petition as follows:

1 through 4. Admits the allegations of paragraphs 1 through 4.

5. Denies the allegations of paragraph 5.

6. (a), (b), and (c) Admits the allegations of paragraph 6(a), (b) and (c).

(d) Admits the allegations in the first two sentences of paragraph 6(d), alleges that it is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 6(d), except it admits that the facilities referred to therein were constructed, purchased, and installed at a cost of \$1,014,930.34.

(e), (f), and (g) Admits the allegations of paragraph 6(e), (f), and (g).

7. Denies the allegations of paragraph 7, except it admits that the language contained in the Necessity Certificates issued to the plaintiff is almost identical to the language contained in the Necessity Certificates in the *Wickes* and *Ohio Power* cases and admits that these cases were decided adversely to the Government.

8. Denies the allegations of paragraph 8.

9. Denies the allegations set forth in the last sentence of paragraph 9 and admits the remaining allegations thereof.

10. Admits the allegations of paragraph 10, except it denies that the Commissioner's refusal to allow additional deductions for amortization was erroneous.

11. Denies the allegations of paragraph 11.

12. Admits the allegations of paragraph 12, except it denies that plaintiff is entitled to recover on any of the grounds set forth in said claims for refund referred to therein and denies all the facts set forth in said claims not expressly admitted in this answer.

13. Admits the allegations of paragraph 13.

14 and 15. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 14 and 15.

Wherefore, defendant prays that plaintiff take nothing from it in this suit and that the same be dismissed with costs against the plaintiff.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

19-20 (Filed November 21, 1955)

In the United States Court of Claims

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Now comes the plaintiff in the above-entitled proceedings, the Allen-Bradley Company, by its attorney, Harvey W. Peters, and shows the Court:

1. That there is no material issue of fact in the above-entitled proceedings, as can be seen upon examination of the Petition and Answer that have been filed.

2. That the facts in the above-entitled proceedings are in all material respects similar to those that were contained in *The Ohio Power Co. v. United States*, 129 F. Supp. 215, Government's petition for certiorari denied on October 17, 1955, and *Wickes Corp. v. United States*, 108 F. Supp. 616, both decided by this Court.

3. That the legal issue involved in the above-entitled proceedings is the identical legal issue that was involved in *The Ohio Power Co. v. United States*, 129 F. Supp. 215, Government's petition for certiorari denied on October 17, 1955, and *Wickes Corp. v. United States*, 108 F. Supp. 616; and that is when the duly certifying authority under Section 124 of the Internal Revenue Code of 1939, as amended, determined that a facility qualified as a defense facility, whether 21-22 it necessarily followed, *a fortiorari*, that the entire cost thereof was amortizable under Section 124.

4. That based upon this Court's decisions in *The Ohio Power Co. v. United States*, 129 F. Supp. 215, Government's petition for certiorari denied on October 17, 1955, and *Wickes Corp. v. United States*, 108 F. Supp. 616, there is ample cause to grant the plaintiff, the Allen-Bradley Company, a summary judgment in the above-entitled proceedings.

WHEREFORE, motion is hereby made that the Court enter an order for a summary judgment in the above-entitled proceedings providing—

1. That the facts are found as stated in the Petition filed on behalf of the plaintiff, the Allen-Bradley Company.

2. That judgment shall be entered for the plaintiff, the Allen-Bradley Company, against the defendant, the United States of America, for the sum of \$178,-327.75, or such greater amount as is legally refundable on the merits of this proceeding, together with interest thereon according to law.

This 18th day of November, 1955.

(s) HARVEY W. PETERS,
Attorney for Allen-Bradley Company,
1308 North Prospect Avenue,
Milwaukee 1, Wisconsin.

It is so ordered by the Court this — day of —, 195—.

— — —,
Judge.

23-24 SUBMISSION OF CASE—March 5, 1956

On March 5, 1956 the case was submitted without argument on plaintiff's motion for summary judgment by Mr. Harvey W. Peters for the plaintiff and by Mrs. Elizabeth B. Davis for the defendant.

25-26 In the United States Court of Claims

No. 290-55

ALLEN-BRADLEY COMPANY

v.

THE UNITED STATES

OPINION OF THE COURT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BY MADDEN, JUDGE. DISSENTING OPINION BY JONES, CHIEF JUDGE—April 3, 1956.

Mr. Harvey W. Peters for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Acting Assistant Attorney General Charles K. Rice*, for the defendant.

MADDEN, Judge, delivered the opinion of the court:

This case involves the same question twice previously decided by this court. The *Wickes Corporation v. United States*, 123 C. Cls. 741; The *Ohio Power Co. v. United States*, 131 C. Cls. 95, certiorari denied, 350 U. S. 862. In accord is *National Lead Co. v. Commissioner*, 23 T. C. 988, 1002. The United States Court of Appeals for the Second Circuit reversed the Tax Court, *Commissioner v. National Lead Co.*, 1956 CCH, par. 9290.

We have reconsidered our earlier decisions in the light of the contrary decision cited above and, with deference, adhere to the view expressed in them.

The plaintiff's motion for summary judgment is granted,

and judgment will be entered for the plaintiff. The amount of recovery will be determined pursuant to Rule 38 (c).

It is so ordered.

LARAMORE, Judge; WHITAKER, Judge; and LITTLETON, Judge, concur.

JONES, Chief Judge, dissenting:

I dissent for reasons stated in dissents in the *Wickes* and *Ohio Power Company* cases cited in the majority opinion.

27 Clerk's Certificate to foregoing transcript (omitted in printing).

28 Supreme Court of the United States

ORDER ALLOWING CERTIORARI—Filed June 11, 1956

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is transferred to the summary calendar. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.